89-1937

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

QUANTUM
CHEMICAL CORPORATION,
Petitioner,

v.

DISTILLERY, WINE & ALLIED
WORKERS INTERNATIONAL UNION,
LOCAL UNION NO. 32, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID N. SHANE
Baker & Daniels
Suite 2700
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

Counsel of Record and Attorney for Petitioner, National Distillers & Chemical Corporation

QUESTIONS PRESENTED

1. Should a federal Court of Appeals *sua sponte* in its decision raise and use a fact-sensitive issue to dispose of the case substantively without any prior notice to the litigants or opportunity to present evidence or argument on that issue?

2. Does common ownership and ultimate corporate control of two separate operating divisions of a company suffice to establish a "single employer" relationship between the divisions such that one division is responsible under federal labor law to receive, respond to and arbitrate a grievance respecting the employees of the other division?

3. Should a federal court give deference to a reasonable prior construction by the National Labor Relations Board in determining whether one division of a corporation has a collective bargaining relationship with a union that compels it to arbitrate with the union?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were the petitioner here, National Distillers & Chemical Corporation; and the respondent here, Distillery, Wine & Allied Workers International Union, Local Union No. 32, AFL-CIO.

Pursuant to Supreme Court Rule 29.1, petitioner states that National Distillers & Chemical Corporation changed its name to Quantum Chemical Corporation on January 1, 1988. Petitioner is not a subsidiary of any other corporation. The following corporations are non-wholly-owned subsidiaries of the petitioner: Buzzini Drilling Company, Inc.; BBSI, Inc.; Jackson Vangas, Inc.; Lifebank, Inc.; H. W. Loud Co.; Norval Polymers Company; Plateau, Inc.; QJV Corp.; QRM Corporation; Atlantic Energy, Inc.; Fallon Propane and Butane Company; Petrolane Incorporated; Petrolane – Southern New Hampshire Gas Company, Inc.; Tropigas Data Services, Inc.; Tropigas Inc. of Florida; Tropigas USA Inc.; Deltagas N.V.; Petrolane Europe B.V.; Petrolane Offshore Limited; Northwest L.P.G. Supply Ltd.

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IN THE
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QUANTUM
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, National Distillers & Chemical Corporation (now named Quantum Chemical Corporation), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 30, 1990, for which rehearing was denied on March 9, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 894 F. 2d 850 (6th Cir. 1990). It is reprinted in the appendix hereto, p. A-1, *infra*. The order of the United States Court of Appeals for the Sixth Circuit denying rehearing is reprinted in the appendix hereto, p. C-1, *infra*. The opinion of the United States District Court for the Southern District of Ohio (Spiegel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. B-1, *infra*.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 185 and 9 U.S.C. § 4, the respondent brought this suit in the Southern District of Ohio. The opinion and order of the Southern District granting summary judgment and compelling arbitration was entered on March 23, 1989. Following a timely appeal, the opinion and order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the Southern District was entered on January 30, 1990. A timely petition for rehearing was denied by the Court of Appeals on March 9, 1990. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent provisions of the federal statutes (9 U.S.C. § 4; 29 U.S.C. § 152(2); 29 U.S.C. § 158(a)(5); 29 U.S.C. § 159(a); 29 U.S.C. § 159(b); 29 U.S.C. § 185) are set forth in the appendix hereto, p. D-1, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

Prior to May 26, 1987, National Distillers & Chemical Corporation ("NDCC") operated a Liquor Division and a Chemical Division.

Although the two Divisions were commonly owned, they operated separately and autonomously.

The two Divisions manufactured different products. The Liquor Division made distilled beverage products for sale to consumers; the Chemical Division made petrochemical intermediates for sale to manufacturers. Neither Division made products for the other.

The Liquor Division had a plant in Cincinnati. The production and maintenance employees at the Liquor Division's Cincinnati plant were represented by the Distillery, Wine & Allied Workers International Union, Local Union No. 32, AFL-CIO ("Distillery Workers Union"). The Chemical Division had no plants in Cincinnati. No Chemical Division plant anywhere had any employees represented by the Distillery Workers Union.

The Chemical Division did have a research laboratory in Cincinnati. That research laboratory had no hourly employees. The Chemical Division paid the Liquor Division to provide maintenance, janitorial and lawn care services to the research laboratory. The Liquor Division used its employees to provide such services. The Liquor Division's Industrial Relations Office controlled its Liquor Division employees, including those it assigned to provide janitorial, maintenance and lawn care services.

The Liquor Division was the named employer party to a collective bargaining agreement with the Distillery Workers Union. The Chemical Division was not party to any agreement anywhere with the Distillery Workers Union.

On May 26, 1987, the Liquor Division was sold to James B. Beam Distilling Co. ("Jim Beam"). As part of the sale, Jim Beam hired all the Liquor Division employees and assumed the Liquor Division's labor contract with the Distillery Workers Union.

On May 27, 1987, after all the Liquor Division employees had become Jim Beam employees, Jim Beam's Industrial Relations Office notified the Chemical Division that Jim Beam was recalling to its plant those Jim Beam employees who previously as Liquor Division employees had provided maintenance, janitorial and lawn care services to the Chemical Division research laboratory.

On June 3, 1987, the Distillery Workers Union mailed a grievance to Chemical Division headquarters. On June 5, 1987, the grievance was returned, with a copy to Jim Beam, because the Chemical Division had no labor contract with the Distillery Workers Union. The Distillery Workers Union never replied.

Instead, on June 15, 1987, the Distillery Workers Union filed with the National Labor Relations Board ("NLRB") an unfair labor practice charge against the Chemical Division. The Regional Director for Region 9 subsequently dismissed the charge, finding that the Chemical Division never had a contractual relationship with the Distillery Workers Union.

B. Prior Judicial Proceedings

Using 29 U.S.C. § 185 and 9 U.S.C. § 4 as the basis for federal jurisdiction in the court of first instance, the Distillery Workers Union filed litigation seeking to compel arbitration of the grievance, alleging that under state law any part of the corporation should be made to respond to the grievance. The Company defended, asserting *inter alia* that federal labor law controlled the case; that the Chemical Division did not contract to receive grievances from the Distillery Workers Union concerning Liquor Division employees; and that the court should give deference to the finding of the NLRB that the Chemical Division never had a contractual relationship with the Distillery Workers Union. On March 23, 1989, the district court ignored the NLRB's finding and used a state corporate law theory to grant summary judgment for the Distillery Workers Union and compel arbitration. *Distillery, Wine & Allied Workers International Union, Local No. 32, AFL-CIO v. National Distillers & Chemical Corporation*, Case No. C-1-87-0586, *see* p. B-1, *et seq., infra.*

NDCC filed a timely appeal. Following briefs and oral argument, the Court of Appeals for the Sixth Circuit issued a decision which for the first time in the case interjected a theory of a "single employer" relationship between the Chemical Division and the Liquor Division, again ignored the NLRB's finding, and affirmed the district court. *National Distillers & Chemical Corporation v. Distillery, Wine & Allied Workers Union, Local No. 32, AFL-CIO*, 894 F. 2d 850 (6th Cir 1990), *see* p. A-1, *et seq., infra.*

NDCC filed a timely petition for rehearing, on the basis that the Court of Appeals' decision turned on a

theory not raised, briefed or argued prior to the decision, misapprehended the "single employer" theory, and ignored the NLRB's finding. On March 9, 1990, the Court of Appeals denied rehearing, *see* p. C-1, *infra*.

REASONS FOR GRANTING THE WRIT

Domestic and international corporations frequently purchase or establish new business operations, creating operating divisions rather than subsidiary corporations. The residue of the decision below is to establish a precedent that will compel any part of a corporation to respond to and arbitrate a grievance sent by a union representing employees in some other part of the corporation, so long as both parts are commonly owned and thus subject to the same ultimate corporate control. Such a precedent will confound, not advance, labor relations.

The Court of Appeals' decision below departed from the accepted and usual course of judicial proceedings. It raised, without notice, and without using a fully-developed record, a substantive, fact-intensive issue -- single employer status. Given the Court of Appeals' methodology, petitioner did not know such a fact-sensitive issue was of interest to the Court and had no opportunity to submit evidence or argument directed to that issue.

The superficial analysis of the Court of Appeals' decision -- relying upon common ownership and ultimate corporate control to find "single employer" status -- conflicts with the decisions of other Courts of Appeal that have addressed the same issue.

The decision ignored the finding of the NLRB that the Chemical Division had no contractual relationship with the Distillery Workers Union under the National Labor Relations Act. The decision thus conflicts with the principle established by this Court that federal courts should give considerable deference to a reasonable construction by the Board as to an issue that implicates its expertise in labor relations.

The issues that led to the erroneous decision below -- fair notice to litigants, proper analysis of a fact-sensitive issue, and appropriate recognition of the NLRB's expertise -- are special and important reasons for this Court to exercise its power of supervision.

I. A Federal Appellate Court Should Not Raise A Fact-Sensitive Issue Sua Sponte In Its Decision To Dispose Of The Case Substantively Without Prior Notice To The Litigants Or Opportunity To Present Evidence And Argument On The Issue

The Court of Appeals below used the NLRB's "single employer" theory to dispose of this case. The first time that theory was raised was in the Court of Appeals' decision. It was not raised, briefed or argued prior to the decision. The Distillery Workers Union's complaint was based on a state contract law concept, as was the judgment of the district court. Neither party raised or briefed a "single employer" theory on appeal, nor was it put in issue at oral argument. The first time NDCC had notice that anyone was suggesting that the Chemical Division was responsible to respond to a grievance under the Distillery Workers Union's labor contract with the Liquor Division because of an alleged "single

employer" relationship to the Liquor Division was after NDCC's receipt of the Court of Appeals' decision.

There are two errors in the Court of Appeals' surprise use of the "single employer" theory in its decision. First, the *ex post facto* notice of the court's interest in and use of the theory denied NDCC a right to be heard on the theory before it was applied. This Court has recognized the litigant's right to know about what it is to be heard. *See, e.g., Morgan v. United States*, 304 U.S. 1, 18, *reh. den.*, 304 U.S. 23 (1938):

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

The Court of Appeals' surprise use of the "single employer" theory also occurs against a record that was not fully developed with that theory in mind. As noted in the Statement of Facts, *supra*, pp. 3-4, and *infra*, pp. 13-15, what evidence there is in the record rejects a "single employer" finding, but the Court of Appeal's sudden and too-quick application of the theory to a cold and undeveloped record made the erroneously superficial use of the theory easier. Particularly given that a "single employer" issue is to be resolved on a case-by-case basis after analysis of "'all the circumstances of the case,'" *National Labor Relations Board v. Don Burgess Const. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979), quoting *Local 627, International Union of Operating Engineers v. NLRB*, 518 F..2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd in part, vacated in part, sub. nom., South Prairie Constr. Co. v.*

International Union of Operating Engineers, 425 U.S. 800 (1976), the Court of Appeals' surprise use of the "single employer" doctrine on a record developed without awareness of the court's interest in the issue is both unfair and unwise. It warrants use of this Court's power of supervision to issue a summary reversal.

II. A "Single Employer" Finding Between Two Separate Operating Divisions Of A Company Sufficient To Compel Arbitration By One Under The Labor Contract Of The Other Requires More Than Identification Of Common Ownership And Ultimate Corporate Control

The Court of Appeals below issued a decision based on a "single employer" theory which was not raised, briefed or argued prior to the Court's decision. The Court of Appeals' superficial analysis below is in direct conflict with the approach taken by many other Courts of Appeal.

The "single employer" doctrine began as a jurisdictional analysis for the Board, under which

> the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, ... The controlling criteria ... are interrelation of operations, common management, centralized control of labor relations and common ownership.

Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, (1965). This determination must be based upon "'all the circumstances of the case' and is

characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *NLRB v. Don Burgess Const. Corp., supra*, 596 F.2d at 384, quoting *Local 627, International Union of Operating Engineers v. NLRB, supra*, 518 F.2d at 1045-46.

Common, centralized control of labor relations is the most important of the four factors, and common ownership is the least important. *See Western Union Corp.*, 224 NLRB 274, 276 (1976), *aff'd sub nom. United Telegraph Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978):

> It is well settled that a critical factor in determining whether separate legal entities operate as a single employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control is not shown.

Indeed, the Board and courts have been extremely leery of utilizing common ownership in any meaningful way, because it is such a constant fact of corporate life in today's world of business conglomerates. *See United Telegraph Workers v. NLRB, supra*, 571 F.2d at p. 667:

> Because common ownership is necessarily a feature of any conglomerate organization, and because common ownership is not determinative where common control is not shown, the Board [properly] held that the union failed to demonstrate that the six corporations were a single employer.

In that case, the Board below had made the logical point that commonality of ownership does not permit an assumption of commonality of control:

> To adopt [that] approach . . . would result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies of a conglomerate are a single employer . . .. But this is contrary to long-established principles followed by this Board.

Western Union Corp., supra, 224 NLRB at 275.

Moreover, the Board and courts have found that two unincorporated divisions of the same corporate employer are not automatically covered by the "single employer" doctrine. The fact that two operating entities are both divisions of the same corporation does not keep them from being separate employers under federal labor law. *See, e.g., American Federation of Television and Radio Artists v. NLRB*, 462 F.2d 887, 892 (D.C. 1972) (and cases cited therein). In holding two unincorporated divisions of the same corporation to be separate employers under Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2), despite their corporation's power to control each division, the court stated:

> True, the ultimate power to control each division belonged to Hearst, since each division manager was answerable to Hearst. As the Board correctly held, however, the test is not whether an unexercised power to control exists. There must be in addition such actual or active common control, as distinguished from merely a potential,

> as to denote an appreciable integration of operations and management policies.

462 F.2d at 892. *See also, Local Union No. 391, International Brotherhood of Teamsters v. NLRB*, 543 F.2d 1373, 1376 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977) ("Although the ultimate power to control both Mideast and Chattanooga [the divisions] resides in Vulcan [the corporation], in fact that power has not been exercised; on the contrary each division exercises final and independent control over its operations, including its labor relations.... In short, the evidence justifies the finding that the divisions are operated as autonomous enterprises...."); *Los Angeles Newspaper Guild, Local 69 v. NLRB*, 185 NLRB 303, 305 (1970), *enf'd.*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

These principles, and the detailed factual analysis of the cases enunciating them, stand in stark contrast to the summary use of common ownership in the Court of Appeal's decision here. That decision, p. A-5, *infra*, deems the common management and common ownership factors to be satisfied by the simple statement that "[b]oth the Liquor and Chemical Divisions were owned and managed by National Distillers." It also deems the interrelation of operations factor to be satisfied merely because "some employees of the Liquor Division were sent to work at the Chemical Division," p. A-5, *infra*, ignoring the fact that the Chemical Division paid the Liquor Division at arm's length for the services provided by its employees.

The decision gives grossly inadequate consideration to the principal factor of centralized control of labor relations, noting only that "[t]here was also central

control of both divisions when the agreement was made," p. A-5, *infra*.

In sum, the Court of Appeals' findings of "single employer" status is based on common corporate ownership and ultimate corporate control of the Divisions. It replaces the requisite detailed factual analysis of the actual operations of each Division to see if they form an "integrated enterprise" with the summary leap from common corporate ownership and ultimate control to "single employer" status.

While focusing too narrowly on the existence of the least important factor, common corporate ownership, the Court of Appeals overlooked such record evidence as does exist. This record evidence is not as substantial as would have been possible had NDCC been given notice of a "single employer" theory and opportunity to supplement the record on remand or on appeal. The record evidence does, however, make clear that it was the Liquor Division, not the Chemical Division, that controlled the labor relations of the employees the Liquor Division assigned to provide services to the Chemical Division's laboratory, and that neither that critical factor nor the others permit a finding of "single employer" status between the two Divisions.

As to the lack of common management: The Chemical Division and Liquor Division operated separately and autonomously. The offices, plants and other locations of the Chemical Division were separate and distinct from those of the Liquor Division. (Joint Appendix submitted by the parties to the Court of Appeals, hereinafter "JA", pages 80-81, ¶ 3)

As to the lack of interrelation of operations: The Liquor Division manufactured distilled products for

consumption; it did not manufacture petrochemical intermediates. The Chemical Division manufactured petrochemical intermediates; it did not manufacture distilled products for consumption. (JA: 80, ¶ 2) The Chemical Division had no plant in Cincinnati (JA: 81, ¶ 4), and none of its employees at plants in other cities and states were represented by the Distillery Workers Union. (JA: 82, ¶ 7) The only Chemical Division location in Cincinnati other than its Division headquarters in Blue Ash and a regional sales office was a research laboratory facility. That facility had no hourly employees. (JA: 81, ¶ 5) When the Liquor Division provided maintenance, janitorial and lawn care services to the Cincinnati laboratory of the Chemical Division laboratory, it used Liquor Division employees and it was paid by the Chemical Division for their services. (JA: 87, ¶ 2)

And, as to the critical factor of lack of centralized control of labor relations: The labor relations management of the Chemical Division was separate from and independent of that of the Liquor Division. The Chemical Division's Employee Relations staff managed all the employee and labor relations activities of Chemical Division employees. (JA: 81, ¶¶ 4-5) The Chemical Division Employee Relations staff was not involved in any employee or labor relations matters of the Liquor Division. (JA: 81, ¶ 6) Bill Herrmann was the Industrial Relations Manager of the Liquor Division's Cincinnati plant and as such controlled the Liquor Division employees who worked there, including those assigned to perform services at the Chemical Division laboratory. (JA: 88, ¶ 3) William J. Smith, to whom the Union directed its grievance, was the Vice-President, Personnel, of the Chemical Division. He

never held any position in or for the Liquor Division. (JA: 8, ¶ 8) The Liquor Division's Cincinnati plant Industrial Relations Office controlled its Liquor Division employees, including those assigned to provide services to the Chemical Division laboratory. The Liquor Division paid them. It made and administered their employment decisions, including hiring, firing, discipline, bidding, bumping, promotion, transfer and assignment. And it did so subject to the labor agreement with the Distillery Workers Union to which the Liquor Division, not the Chemical Division, was the named employer party. (JA: 88, ¶ 3; *see also* JA: 9, 14, 15 and 33)[1] The Chemical Division did not control which Liquor Division employees were directed by the Liquor Division to provide maintenance, lawn care and janitorial services. The Liquor Division sent and pulled back people as its needs dictated. (JA: 88, ¶ 4) Grievances from employees of the Liquor Division were handled by the Liquor Division's Industrial Relations Office. When arbitrations were necessary, the Liquor Division was the employer party to the arbitration. The

[1] The decision (p. A-5-6) also cites comments made from the Liquor Division's perspective. It is natural that the Liquor Division would consider employees it assigned to provide services to the laboratory to be part of its departmental assignments of employees under the Liquor Division labor contract and would arbitrate their grievances filed against the Liquor Division concerning such assignments. From the perspective of the Liquor Division, its labor contract followed its employees on their assignments, no less than a labor contract covering employees of a lawn care or janitorial services company would follow them to assignments at their customers' premises. But the fact that the contract follows the employees does not mean that the customer (here, the Chemical Division) becomes the employer.

Liquor Division's labor relations counsel handled the arbitrations. Neither the Chemical Division nor its Employee Relations staff nor its separate legal counsel were involved. (JA: 88-89, ¶ 5)

The sum of this evidence is that the record evidence does not reflect anywhere near an adequate showing of interrelation of operations, common management or, most importantly, centralized control of labor relations to sustain a finding of "single employer" status. To the contrary, the record evidence compels a conclusion that the Liquor Division and the Chemical Division were separate employers, not a "single employer."

By giving superficial application to the "single employer" theory, the Court of Appeals has created a method of analysis that is in conflict with that used by the NLRB and other Courts of Appeal. The decision below also creates a result entirely at odds with common sense. It contorts the realities of federal labor law beyond all reason to suggest that one division of a company be compelled to accept, process and arbitrate a grievance concerning an alleged violation of a contract covering employees in another division, just because one corporation owns and ultimately could control both divisions. The Court of Appeals erred in leaping to that conclusion here without benefit of the proper analysis.

III. A Federal Court Should Give Considerable Deference To A Reasonable Construction By The National Labor Relations Board

The National Labor Relations Board is charged by federal law, 29 U.S.C. § 159(a) and (b), with determining whether a collective bargaining

relationship exists, between whom, and concerning what bargaining unit of employees. After the Chemical Division returned the Distillery Workers Union's grievance on the basis that it had no labor contract with the Distillery Workers Union, the Union filed an unfair labor practice charge alleging, *inter alia*, that the Chemical Division had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by refusing to recognize the Distillery Workers Union. The Regional Director for Region 9 of the NLRB investigated and dismissed the Union's charge against the Chemical Division, finding that the Chemical Division "never had a contractual relationship with the Union." (JA: 198)

This Court has recognized that, where the NLRB has applied its expertise in labor relations, the federal courts should give a reasonable construction by the NLRB considerable deference. *See, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30, (1984), reversing the Sixth Circuit's rejection of the NLRB's findings and conclusions:

> We have often reaffirmed that . . . on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944).

The Court of Appeals' decision below wholly ignored the Regional Director's finding of the absence of a contractual relationship between the Distillery Workers Union and the Chemical Division under the National Labor Relations Act. In so doing, the Court of Appeals violated the principle of appropriate deference

in areas of the NLRB's labor relations expertise. As such, the Court of Appeals acted in conflict with the applicable principle established by this Court.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DAVID N. SHANE
Baker & Daniels
Suite 2700
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

Counsel of Record and Attorney for Petitioner, National Distillers & Chemical Corporation

Dated: June 7, 1990

APPENDIX A

No. 89-3265

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff-Appellee,* v. NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant-Appellant.*	)	ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 30, 1990

Before: MERRITT, Chief Judge; WELLFORD, Circuit Judge; and DeMASCIO, Senior District Judge.*

MERRITT, Chief Judge. Defendant National Distillers seeks review of the District Court's order denying its motion for summary judgment and compelling arbitration. We affirm.

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*The Honorable Robert E. DeMascio, Senior Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

Defendant National Distillers is organized into the Liquor Division and the Chemical Division. National Distillers Liquor Division entered into a collective bargaining agreement with Distillery, Wine & Allied Workers International (the Union). The agreement provided that the Liquor Division would employ only Union members and that any disputes not resolved would be subject to arbitration.

The Liquor Division sent approximately twenty-five employees to the Chemical Division to provide maintenance, janitorial and lawn care services. For some purposes, the employees appear to have been joint employees of both divisions. Although these employees worked at the Chemical Division part time, they remained "employees" of the Liquor Division.

James B. Beam Distilling Company (Jim Beam) bought the Liquor Division from National Distillers in May of 1987, and replaced National Distillers as the employer party to the collective bargaining agreement. The day after the sale was closed, Jim Beam, now the employer of all Liquor Division employees, recalled those workers previously assigned to the Chemical Division. The recalled workers in turn used their seniority to stay at Jim Beam, but less senior employees were less fortunate. Some were demoted while others were terminated altogether as a result of this recall. In order to replace those recalled workers, the Chemical Division hired non-Union employees.

In an attempt to redress these alleged wrongs the Union mailed a grievance to the Chemical Division on June 3, 1987, stating that "on 5-29-87 all union research employees were removed from the plant (25 jobs). Their

work is being performed by non-union employees. Their current contract does not expire until 9-30-88." After the Chemical Division returned the grievance, the Union filed a charge with the National Labor Relations Board (NLRB) against both the Liquor and Chemical Divisions, and Jim Beam. The NLRB refused to issue a complaint and the Union then filed an action to compel arbitration in District Court.

Defendant National Distillers filed a motion for summary judgment essentially claiming that the Union should have directed its grievance to Jim Beam. The District Court denied defendant's motion and ordered them to submit to arbitration. It is from this order that defendant appeals.

The sole issue on appeal is whether this matter should go to arbitration. In order to reach that issue we must determine whether National Distillers, including its remaining Chemical Division, is now bound by the arbitration provisions of the collective bargaining agreement. Although the Chemical Division was not explicitly named in the agreement, we find that as a division of National Distillers, which was a signatory, they are bound. The question then becomes whether the issue of hiring non-Union maintenance employees is subject to arbitration. We conclude that it is.

Although there is a strong federal policy which favors arbitration, *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988); *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986), courts must decide whether arbitration is appropriate in the first instance. *AT&T Technologies*, 475 U.S. at 649; *John Wiley & Sons v. Livingston*,

376 U.S. 543, 546 (1964). In deciding whether a grievance should go to arbitration, courts may not inquire into the merits of a particular claim. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Because collective bargaining agreements are contracts, parties who are not bound should not be obligated to arbitrate a dispute. *Wiley*, 376 U.S. at 547; *Steelworkers*, 363 U.S. at 582. However, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Steelworkers*, 363 U.S. at 582-83. Thus, because the collective bargaining agreement at issue in this case might reasonably be interpreted to include former maintenance employees working jointly at the Liquor and Chemical Divisions, we find that this grievance should be arbitrated. We intimate no view of the merits of the arbitrable claim.

While only parties to collective bargaining agreements are bound generally, in some instances a non-signatory to the agreement may be so closely related to a signatory that both are bound. *Crest Tankers v. National Maritime Union of America*, 796 F.2d 234 (8th Cir. 1986); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). The National Labor Relations Board created the single employer doctrine to treat two or more entities as one under the definition of "employer" of section 2(2) of the

NLRA, 29 U.S.C. § 152(2). *Pratt-Farnsworth*, 690 F.2d at 504.

The NLRB employs four factors in determining whether two or more related entities can be considered a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965); *see also NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). Whether two entities will be considered a single employer depends on the circumstances of the case taken as a whole. *Don Burgess*, 596 F.2d at 384 (citing *Local No. 627, Int'l Union of Operating Eng'rs v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd in part sub nom. South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976)).

In this case we believe that the circumstances taken as a whole warrant a finding of single employer status. Both the Liquor and Chemical Divisions were owned and managed by National Distillers, thus satisfying the second and fourth prongs of the *Radio Union* test. There was also a clear interrelation of operations. For example, some employees of the Liquor Division were sent to work at the Chemical Division, thus satisfying the first prong. There was also central control of both divisions when the agreement was made, and the arbitrator will have to decide, among other things, whether the twenty-five maintenance jobs at the Chemical Division were traditionally Union jobs.

Additionally, there is support both in the collective bargaining agreement itself and from past matters that have been arbitrated for a finding of single employer status. The agreement makes several references to "departments," and the Chemical Division was a department of National Distillers. William Herrmann, National Distillers' Industrial Relations Manager, stated in a deposition that the Chemical Division was considered to be one of the bargaining unit departments. Joint App. at 289. In an arbitration hearing in 1981 one of National Distillers' lawyers stated that the maintenance employees of the Chemical Division were covered under the same agreement, and implied that the Liquor and Chemical Divisions were part of a single entity by stating that they were both divisions of National Distillers. Joint App. at 228.

Therefore we hold that even thought the Chemical Division was not a signatory to the collective bargaining agreement, it will still be bound by virtue of its single employer status with the Liquor Division under the umbrella of National Distillers.

Accordingly, the judgment of the District Court compelling National Distillers to arbitrate this grievance is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff,*	)	No. C-1-87-0586
VS.	)	ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND COMPELLING ARBITRATION
NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant.*	)	

Before the Court are defendant's motion for summary judgment (doc. 13), plaintiff's response in opposition thereto (doc. 15), and defendant's reply memorandum.

This is an action by plaintiff, a labor organization (hereafter Local Union or Local), against defendant, an employer which employed plaintiff's members at its distillery, bottling plant and research facility (hereafter National Distillers), for breach of contract and refusal to arbitrate a dispute. Plaintiff seeks an order compelling defendant to arbitrate a grievance. Defendant now moves for summary judgment on grounds that it did not violate any labor contract with the local union. The parties have stipulated that the Court may entirely resolve the action through its order on this motion.

Facts

In 1985, the Local Union entered into a collective bargaining agreement with the National Distillers Products Company Division (the Liquor Division) of National Distillers. The contract prohibits performance of work "normally performed by employees in the bargaining unit, which employees now perform or have performed in the past," by persons excluded from the bargaining unit. Article I, ¶ 3, p. 4. Further, the agreement provides that "[n]o such work . . . belonging to employees in the bargaining unit shall be contracted out to, or performed by, any other employer or employees except upon due consultation with the Union. Any disagreement not satisfactorily resolved shall be subject to arbitration." Art. XVI, p. 25. Finally, the agreement is binding upon the parties and their assigns. Art. XXVII, p. 37.

The Liquor Division plants are located west of Interstate Highway 75. The USI Chemicals Company Division of National Distillers (USI) operates a research and development facility to the east of I-75. In the 1950s, the Liquor Division began to provide maintenance, janitorial and lawn care services to the USI facility. The maintenance employees sent by the Liquor Division remained employees of the Liquor Division and were subject to the labor agreement with the local union.

In Fall, 1986, the Liquor Division was put up for sale. On April 8, 1987, James B. Beam Distilling Company (Jim Beam) and National Distillers entered into an Asset Sale Agreement, which provided, in pertinent part, that Jim Beam replaced the Liquor Division as the employer party to the labor agreement

discussed above. The sale was closed on May 26, 1987. On May 27, 1987, all members of the local union were recalled from their maintenance jobs at USI, which was still owned by National Distillers, by their new employer, Jim Beam. These workers used their seniority to remain on the job at Jim Beam; however, this resulted in the termination or demotion of other employees with less seniority. USI hired non-union companies to fulfill its maintenance needs.

On June 3, 1987, the local union mailed a grievance form to USI. The grievance provided that "on 5-29-87 all union research employees were removed from the plant (25 jobs). Their work is being performed by non-union employees. Their current contract does not expire until 4-30-88." USI refused the grievance. The local union filed a charge with the National Labor Relations Board (NLRB) against the Liquor Division, USI, and Jim Beam, alleging that on June 1, 1987, they had refused to bargain collectively with the local. The NLRB refused to issue a complaint on the local unions' charge. This action to compel arbitration followed.

Standard for Summary Judgment

Rule 56(c), Fed. R. Civ. P., provides that summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of proof, and "the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case and on which that party will bear the burden of proof at trial . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Analysis

Defendant contends that it is entitled to summary judgment because (1) the USI division of defendant was never a party to plaintiff's labor agreement; (2) Jim Beam was the employer of plaintiff's members at the time cited in the grievance; and (3) Jim Beam took the action which the local union alleges violated the labor agreement. Plaintiff argues that defendant as a corporation is not an entity separate from its administrative divisions, and therefore defendant was a signatory to the contract between its Liquor Division and the local union. Further, plaintiff asserts that an arbitrator must rule on whether the grievance should have been directed to Jim Beam rather than to defendant or one of its divisions.

Whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for the court. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 642, 649 (1985); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964). In deciding whether the parties have agreed to arbitrate the grievance at issue, the court may not rule on the merits of the underlying claim. *AT&T Technologies*, 475 U.S. at 649; *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). If the court decides that arbitration is appropriate, the grievance, no matter how frivolous it appears to the court, must be referred to an arbitrator for decision. *American Mfg. Co.*, 363 U.S. at 568.

The instant motion for summary judgment requires the court to determine whether defendant National Distillers is bound by the provisions of the collective bargaining agreement. This issue goes to the very heart of arbitrability, and consequently is to be resolved by the court. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (holding that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

Preliminarily, we conclude that assignment of the labor contract to Jim Beam would not preclude the union from seeking relief from National Distillers. The labor contract was assigned to Jim Beam prior to the time cited in the grievance, and Jim Beam took the action upon which the grievance is premised. Jim Beam is clearly a successor to the Liquor Division, and as such is bound by the terms of the collective bargaining agreement at issue here. *Wiley*, 376 U.S. at 548; *National Labor Relations Bd. v. Burns Security Services*, 406 U.S. 272, 281 (1972). It therefore had a duty to arbitrate grievances pursuant to the contract. However, assumption by the assignee of an assignor's obligations under the contract assigned does not prevent recovery of damages from the assignor if the assignee fails to fulfill its obligation. 4 A. Corbin, Corbin on Contracts § 866 (1972); Restatement of Contracts § 160(4); 18 Ohio Jur. 3d § 271 (1980).[1] Thus, the filing of a grievance against USI instead of Jim Beam would not defeat the union's action to compel arbitration.

Furthermore, we conclude that defendant National Distillers was a party to the collective bargaining agreement by virtue of its relationship to

the employer signatory to that contract (the Liquor Division of National Distillers). *C.f. National Labor Relations Bd. v. Deena Artware, Inc.*, 361 U.S. 398 (1960) (reversing the dismissal of the Board's petition for adjudication of civil contempt to allow the Board to offer proof that certain subsidiaries were divisions of a single corporate enterprise and thus the enterprise could be held liable for the actions of its alleged divisions or departments). Similarly, we find that mailing the grievance to USI was sufficient to inform National Distillers of its obligations under the bargaining agreement. Accordingly, pursuant to the national policy favoring arbitration of labor disputes, *see AT&T Technologies*, 475 U.S. at 650, we hereby Order defendant to arbitrate the grievance at issue here.

For the foregoing reasons, defendant's motion for summary judgment is denied and defendant is Ordered to arbitrate the union's grievance.

SO ORDERED.

/s/

S. Arthur Spiegel
United States District Judge

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[1] While collective bargaining agreements are to be construed under applicable federal law, *Wiley*, 376 U.S. at 550, neither party has cited, and our research has not disclosed, federal labor law dispositive of this issue. Under these circumstances, we conclude that federal labor policy will be effectuated by recognizing state contract law. *See Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3265

DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff-Appellee,*	)	
v.	)	ORDER
NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant-Appellant.*	)	

Before: MERRITT, Chief Judge; WELLFORD, Circuit Judge; and DeMASCIO, Senior District Judge.*

Upon consideration of the petition for rehearing filed herein by the defendant-appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

FILED MARCH 9, 1990

*The Honorable Robert E. DeMascio, Senior Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX D

STATUTES INVOLVED

9 U.S.C. § 4

Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction For Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the

failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

29 U.S.C. § 152(2)

Definitions

When used in this subchapter —

. . .

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 158(a)(5)

Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer —

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159

Representatives and Elections -- Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of Bargaining Unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

29 U.S.C. § 185(a)

Suits By and Against Labor Organizations, Venue, Amount and Citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commence as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.